Filed 3/15/19 Escalante v. County of Riverside CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

REFUGIO ESCALANTE, Plaintiff and Appellant, v. COUNTY OF RIVERSIDE, Defendant and Respondent.	E069145 (Super.Ct.No. RIC1615162) OPINION

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia, Judge. Affirmed.

Refugio Escalante, in pro. per., for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Arthur K. Cunningham; Arias & Lockwood and Christopher D. Lockwood for Defendant and Respondent.

Plaintiff Refugio Escalante, in propria persona, sued the County of Riverside erroneously under the name of the Riverside County Sheriff's Department (hereafter the County), alleging deputies at the County's jail were negligent in preventing Escalante from timely receiving medical treatment for ulcerative colitis, and that the jail medical staff negligently misdiagnosed him and prescribed medications, which exacerbated his condition. The County demurred contending, inter alia, that Escalante did not timely submit a government tort claim before filing suit. The superior court sustained the demurrer and granted Escalante 30 days leave to amend. The County served Escalante with notice of the ruling, as directed by the trial court.

Escalante did not file an amended complaint within the time permitted, but instead filed a motion to amend the complaint. The superior court denied the motion, and subsequently granted the County's ex parte application to dismiss the lawsuit and entered judgment dismissing Escalante's complaint with prejudice. On appeal, Escalante argues the superior court itself was required to provide him with notice that it had sustained the County's demurrer with 30 days leave to amend, and that the notice he received from the County was ineffective. We disagree and affirm the judgment.

I.

FACTS AND PROCEDURAL BACKGROUND[1]

On November 14, 2016, Escalante filed a form complaint alleging general negligence.[2] Escalante named as defendants the Riverside County Sheriff's Department and Does 1 through 8. Escalante alleged he suffered general damages and continued to suffer pain and suffering, and he prayed for compensatory and punitive damages according to proof.

In an attachment, Escalante alleged that, while in pretrial detention from May 7, 2013 through November 18, 2014, he suffered severe pain and suffering due to ulcerative colitis. He further alleged that on or about February 20, 2014 through March 2, 2014, he began experiencing severe abdominal pain and bloody stool. Escalante immediately informed jail personnel and was told to fill out a request for medical services. Several

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[1] On April 18, 2018, this court granted the County's request to augment the record with the following documents: (1) the County's May 31, 2017 demurrer; (2) the County's May 31, 2017 request for judicial notice in support of the demurrer; (3) Escalante's July 20, 2017 motion to amend court filing (the complaint); (4) the County's August 17, 2017 opposition to the motion to amend; and (5) Escalante's September 11, 2017 response to the County's opposition to the motion to amend. (Cal. Rules of Court, rule 8.155(a).)

On our own motion, we now take judicial notice of the following additional documents, which were filed in the superior court but omitted from the clerk's transcript: (1) Escalante's November 14, 2016 complaint; (2) the June 26, 2017 order sustaining the County's demurrer with leave to amend; and (3) the County's June 29, 2017 notice of ruling. (Evid. Code, §§ 452, subd. (d), 459, subd. (a); Cal. Rules of Court, rule 8.252(a).)

[2] Because the superior court dismissed the action when Escalante failed to amend his complaint after the court sustained the County's demurrer with leave to amend, we must assume the complaint contained the strongest statement of Escalante's negligence cause of action. (*Lyles v. Sangadeo-Patel* (2014) 225 Cal.App.4th 759, 764.) We assume the truth of all facts properly pleaded in the complaint, but not the truth of legal conclusions made therein. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100.)

days passed before Escalante was finally taken to be examined by medical staff, who diagnosed him with hemorrhoids and prescribed 600 milligrams of Motrin and Pepto-Bismol. After still experiencing severe abdominal pain and bleeding for a few more days, Escalante submitted a grievance that was denied.

About a week later, Escalante showed jail personnel how much blood he was still passing through his stool, and he was immediately taken to the hospital where he was admitted for six days and diagnosed with ulcerative colitis. The doctor's told Escalante that his condition had been exacerbated by the Motrin he had been prescribed, and that he now had an increased risk of colon cancer. The doctors prescribed several medications to Escalante, but he was not given any medications once he returned to the jail. The next day, Escalante was told the jail's medical staff could not find his prescriptions. He was taken back to the hospital a few days later due to complications. Escalante alleged that, as of October 10, 2016, he was under chronic care treatment in state prison where he is still suffering complications from his ulcerative colitis.

Escalante alleged: (1) Does 1 through 8 were the jail custodial and medical staff; (2) the jail custodial staff violated the Eighth Amendment to the United States Constitution by forcing him to wait for treatment in an emergency situation; and (3) the jail medical staff violated the Eighth Amendment by misdiagnosing him and prescribing medications, which further exacerbated his condition.

The County demurred to the complaint contending Escalante failed to timely submit a tort claim within six months of his alleged injuries as mandated by the Government Claims Act. (Gov. Code, § 900 et seq.; see *id.*, §§ 911.2, 945.4.) The County requested the superior court take judicial notice of a declaration from an assistant to the clerk of the Riverside County Board of Supervisors. The assistant clerk declared that the clerk of the board had no record of Escalante submitting a tort claim, timely or otherwise. The County also argued the complaint failed to state a claim for negligence because Escalante did not cite any specific statute imposing liability on the County for negligence, and Escalante's claim for punitive damages was barred by Government Code section 818.

On June 26, 2017, the superior court conducted a hearing on the County's demurrer. The court sustained the demurrer but granted Escalante 30 days leave to amend his complaint. The minutes state, "Notice to be given by defendant's counsel." Three days later, the County served and filed a notice of ruling, which specifically stated the superior court had sustained the demurrer and given Escalante 30 days leave to amend.

Escalante did not file an amended complaint. Instead, on July 20, 2017, Escalante filed a document entitled, "Motion to Amend Court Filing." Escalante moved to amend his complaint to substitute Dr. Hilario and Dr. Montengro, physicians employed at the county jail, for Does 1 and 2. Escalante also moved to amend his cause of action from general negligence to deliberate indifference.

The County opposed Escalante's motion contending: (1) the proposed amendments did not cure the defects in the original complaint because Escalante did not cite a specific statute that declared the County liable for deliberate indifference; (2) Escalante still did not plead compliance with the Government Claims Act; (3) Escalante did not specify by page, paragraph, and line number the allegations in the complaint that he wished to amend, as mandated by California Rules of Court, rule 3.1324(a)(3); and (4) the court should dismiss the complaint because Escalante failed to file an amended complaint within 30 days as directed.

On August 30, 2017, the superior court conducted a hearing on Escalante's motion to amend. The court denied the motion and again directed the County to give notice of the ruling. The County served Escalante with a notice of ruling the same day and filed it with the court the next day.

On August 31, 2017, the County filed an ex parte application requesting the superior court dismiss the action pursuant to Code of Civil Procedure section 581, subdivision (f)(2), because Escalante had not amended his complaint within 30 days. The superior court granted the application and dismissed with prejudice the action in its entirety. Once again, the court directed the County to give notice of the ruling. The County served Escalante with a notice of ruling on September 1, 2017, and filed it with the court on September 5, 2017.

On September 11, 2017, Escalante belatedly filed a response to the County's opposition to the motion to amend. Escalante explained he did not file an entirely new amended complaint because he "wished to rely on the complaint already on record, and

not burden the Court with un-needed paperwork." Escalante addressed the County's arguments that the complaint and proposed amendments thereto did not specifically cite any authority for holding the County liable for negligence or deliberate indifference. Escalante did not, however, address the County's argument that he still did not plead compliance with the Government Claims Act.

Escalante filed a premature notice of appeal on September 14, 2017. (See Cal. Rules of Court, rule 8.104(d)(2) ["The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment."].)

Finally, on September 21, 2017, the superior court entered judgment dismissing Escalante's complaint with prejudice.

II.

DISCUSSION

In his opening brief, Escalante contends he "never received any ruling from the court directing him to take any action, let alone to amend his complaint." He argues a notice of ruling served by the attorney for a party "is a conflict of interest." Escalante also argues "only the court can direct a party to take action or issue a ruling for or against a party" and, therefore, it was reasonable for him to wait to receive "an official

court ruling" before filing an amended complaint.[3] The law is to the contrary.

If the superior court sustains a demurrer, "the court may grant leave to amend the pleading upon any terms as may be just and shall fix the time within which the amendment or amended pleading shall be filed." (Code Civ. Proc., § 472a, subd. (c).) "[U]nless otherwise ordered, leave to . . . amend within 10 days is deemed granted . . . ."[4] (Cal. Rules of Court, rule 3.1320(g).) The time to file an amended complaint "runs from the service of notice of the decision or order, unless the notice is waived in open court, and the waiver entered in the minutes." (Code Civ. Proc., § 472b.) If notice is made by mail, the time to amend is extended by five calendar days. (Code Civ. Proc., § 1013, subd. (a); see *People v. $20,000 U.S. Currency* (1991) 235 Cal.App.3d 682, 689.)

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[3] Because Escalante is currently serving a state prison sentence, we granted him leave to file written arguments in lieu of oral argument. In his written submission, Escalante argues defendants were not prejudiced by his failure to timely submit a government claim. As noted, *post*, footnote 7, we need not address defendants' alternative argument that the judgment should be affirmed because Escalante cannot plead compliance with the Government Claims Act.

In any event, Escalante is mistaken. A public entity defendant need not show it was prejudiced by a plaintiff's failure to timely submit a government claim unless the plaintiff applies to the public entity for leave to file a late claim and/or moves the superior court to be relieved entirely of the requirement of timely filing a claim, *and* the plaintiff shows the failure to timely file a "claim was through mistake, inadvertence, surprise or excusable neglect." (Gov. Code, § 911.6, subd. (b)(1); see § 946.6, subd. (c)(1).) Escalante filed no such application or motion.

[4] In forcible entry, forcible detainer, and unlawful detainer cases, only five calendar days are deemed granted. (Cal. Rules of Court, rule 3.1320(g).)

"When a motion[5] is granted or denied, unless the court otherwise orders, notice of the court's decision *shall be given by the prevailing party* to all other parties or their attorneys, . . . unless notice is waived in open court and is entered in the minutes." (Code Civ. Proc., § 1019.5, subd. (a), italics added.) The purpose of giving notice is to start the time running to amend or answer after the court has ruled on a demurrer, or to seek reconsideration. As well, notice assures that parties not present at the hearing are aware of the court's order. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 7:135, p. 7(I)-62, ¶ 9:320:1, p. 9(I)-140.)

The clerk of the superior court must provide notice "[w]hen a motion is granted or denied on the court's own motion . . . ." (Code Civ. Proc., § 1019.5, subd. (b).) The clerk is also required to provide notice when the court rules on a matter taken under submission, but such notice "constitutes service of notice"—and, therefore, triggers the time in which the amended pleading must be filed—"only if the clerk is required to give notice under Code of Civil Procedure section 664.5." (Cal. Rules of Court, rule 3.1109(a).) In turn, Code of Civil Procedure section 664.5 provides that, except for in small claims cases and actions or special proceedings where the prevailing party is self-represented, the prevailing party who submits an order or judgment shall serve notice of entry on all parties. (Code Civ. Proc., § 664.5, subd. (a).) The clerk of the court is required to serve

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5 A motion is an application to the superior court for an order. (Code Civ. Proc., § 1003.) Technically speaking, a demurrer is not a motion—it is a *pleading*. (*Id*., § 422.10.) Nonetheless, we assume the statutes and rules governing the giving of notice of the ruling on a motion apply equally to demurrers. (See Cal. Rules of Court, rule 3.1103(c); Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 7:136, p. 7(I)-62.)

notice of entry of judgment when the prevailing party is self-represented, or when specifically directed to do so by the court. (*Id*., subds. (b), (d).)

The superior court may dismiss the complaint if, "after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal." (Code Civ. Proc., § 581, subd. (f)(2).) A request for dismissal of "the entire action and for entry of judgment" under Code of Civil Procedure section 581, subdivision (f)(2), may be made ex parte. (Cal. Rules of Court, rule 3.1320(h).) Such a judgment of dismissal must be made with prejudice.[6] (*Cano v. Glover* (2006) 143 Cal.App.4th 326, 329-330.) "The decision to dismiss an action under [Code of Civil Procedure] section 581, subdivision (f)(2) rests in the sound discretion of the trial court and a reviewing court will not disturb the ruling unless the trial court has abused its discretion. [Citation.] It is appellant's burden to establish an abuse of discretion. [Citation.]" (*Gitmed v. General Motors Corp.* (1994) 26 Cal.App.4th 824, 827.)

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[6] In his written brief in lieu of oral argument, Escalante contends dismissal for delay or failure to prosecute under Code of Civil Procedure section 581, subdivision (b)(4), must be made without prejudice. True, some of the bases for dismissal under section 581 must be made without prejudice. (Code Civ. Proc., § 581, subds. (b)(3)-(5), (g)-(h), (*l*).) Other bases for dismissal under that statute may be made with *or* without prejudice. (*Id*., subd. (b)(1)-(2), (c).) But Escalante's case was dismissed under section 581, subdivision (f)(2). Although that portion of the statute does not expressly state whether the dismissal must be with or without prejudice, it has been interpreted to require dismissal *with* prejudice. (*Cano v. Glover*, *supra*, 143 Cal.App.4th at pp. 329-330.) We agree with that straightforward interpretation by our colleagues in the Second Appellate District, and we decline to revisit the issue here. (See *Kruss v. Booth* (2010) 185 Cal.App.4th 699, 713, fn. 14 [stating the opinion in *Cano* "is largely a gloss on section 581, subdivision (f) of the Code of Civil Procedure"].)

The superior court in this case did not take the County's demurrer under submission; the court directed the County's attorneys to give notice, not the clerk; and the prevailing party—the County—was represented by counsel. Therefore, the clerk of the superior court was *not* required to provide notice (Code Civ. Proc., § 664.5; Cal. Rules of Court, rule 3.1109(a)), and the County's attorneys *were* required to provide notice instead. (Code Civ. Proc., § 1019.5, subd. (a); see fn. 5, *ante*.) There is no genuine dispute that the County served Escalante with notice of the superior court's ruling sustaining the demurrer with 30 days leave to amend.

In his reply brief, Escalante concedes Code of Civil Procedure section 1019.5 appears to "allow the prevailing party to serve notice on the opposing party," but he argues that statute "does not state that the prevailing party does not have to serve a document signed by the court." Escalante is wrong. When applicable, Code of Civil Procedure section 1019.5, subdivision (a), *mandates* that the prevailing party provide notice. (Code Civ. Proc., § 1019.5, subd. (a) ["notice of the court's decision or order *shall* be given by the prevailing party" (italics added)]; see *People v. Standish* (2006) 38 Cal.4th 858, 869 ["Ordinarily, the term 'shall' is interpreted as mandatory and not permissive. Indeed, 'the presumption [is] that the word "shall" in a statute is ordinarily deemed mandatory and "may" permissive.'"].)

And Escalante can point to no authority for the proposition that the party who provides notice of the superior court's ruling must serve an actual order signed by the court. "While it is true [that Code of Civil Procedure] section 472b requires service of notice of the order sustaining or overruling a demurrer in order to start the time running

on the right to amend [citation], section 472b does *not* specify what the form of the notice should be. [Citation.]" (*Parris v. Cave* (1985) 174 Cal.App.3d 292, 294.) To be sure, "there can be no better notice of what an order says than is provided by a file-stamped copy of the order itself." (*Ibid.*; see *Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318 [service by defendant of minute order stating court sustained demurrer with leave to amend "was sufficient to trigger the time within which [plaintiffs] were required to amend their complaint"].) But accurate and timely written notice of what the order says is sufficient.

Because Escalante received accurate and timely notice that the superior court had sustained the County's demurrer with 30 days leave to amend, and he did not file an amended complaint within the time permitted, the court correctly dismissed the lawsuit with prejudice. Escalante had the burden of establishing a prejudicial abuse of discretion, and he has failed to do so.[7] Therefore, we affirm the judgment of dismissal.

[7] Because we conclude the superior court properly dismissed Escalante's complaint when he failed to file an amended complaint within the time permitted, we need not address the alternative grounds for affirmance addressed in the County's brief.

III.

DISPOSITION

The judgment of dismissal is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

RAPHAEL
J.